

The outside keeps creeping in: On the impossibility of engaging in purely doctrinal scholarship

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Danae Azaria's [article](#) is a perfect example of a specific genre of international law scholarship: an 'orthodox' account that wishes to stay neatly within the lines that legal doctrine draws between 'legal' and 'extra-legal' considerations. This contribution is critical not so much of Azaria's article as such but of the genre of international law writing it represents.

Azaria's article contains two central propositions. The first is descriptive and says that the International Law Commission (ILC) has been engaging in a practice she calls 'codification by interpretation'. The second is normative and consists in asserting that this practice should be embraced as it contributes to the legitimacy of international law as a whole. Azaria refers mainly to the projects concerning the interpretation of the [1969 Vienna Convention on the Law of Treaties](#) (VCLT). This focus on the interpretation of the VCLT itself is crucial for the core of Azaria's argument on the contribution of the ILC's interpretative practice to international law's legitimacy. Azaria argues that this practice reaffirms and clarifies the secondary rules contained in the VCLT, thereby exerting a sustained influence on how to create, apply, and terminate international treaties containing primary rules across all international legal fields. This, in her account, "has the potential to instil international law with continued legitimacy" (at p. 172).

Interpretation, international law, and legal positivism: an uneasy relationship

Basing the interpretation of rules on rules of interpretation necessarily leads to problems of [self-referentiality](#). Kurt Gödel's [incompleteness theorems](#) have shown that formal systems that use one language to describe meta-questions about that same language can never be both consistent and complete. Therefore, even if it were possible to eliminate all the muddiness of every-day natural language and of legal argument, precise predictability of interpretive outcomes would always remain an unattainable goal. Azaria's article does not entirely neglect the problems arising from self-referentiality. As a way out of the '[infinite regress](#)', she chooses to follow the 'rules perception' of the actors who 'use' the VCLT (at p. 175). Azaria argues that these actors base their practice "on the assumption that there is one correct interpretation and that this meaning has to be found" (at p. 176). In choosing to place her article within this paradigm, she explicitly states that her article "does not deal with the philosophical, social, political or other aspects of interpretation". Instead of dealing with these 'external' aspects, her article engages in "a positive law analysis" (at p. 176).

Engaging with Azaria's article on its own terms, there is at least one simply unavoidable philosophical question: How does her 'positive law analysis' fit into legal positivism? Specifically, if she claims to engage in a positive law analysis, how does the assumption she ascribes to interpreting agents in international legal practice – namely that they are in the business of finding one correct interpretation of a legal rule – fit into philosophical accounts of legal positivism? This question points towards an [uneasy relationship](#) between international lawyers who call themselves 'positivists' on the one hand and legal positivism as a philosophical school of thought on the other hand. The legal philosophers who have shaped legal positivism have done so by emphatically rejecting the idea that there is one correct interpretation of a legal text. In the famous so-called '[Hart-Dworkin Debate](#)', it was the positivist side that rejected Ronald Dworkin's thesis that there is [one right answer](#) to legal questions, which can be found by way of interpretation. Similarly, Hans Kelsen insisted that the process of deriving the content of a legal norm in question from a higher-ranking norm can only provide a frame of appropriate interpretative decisions and that within this frame, the interpreting organ enjoys discretion to create a new norm (Kelsen, [Reine Rechtslehre](#) at p. 90-91).

Azaria's article is not informed by positivism as legal philosophy. By claiming that her article engages in a positive law analysis, Azaria is probably not referring to positivism as a philosophical current but subscribing to a school of thought of international lawyers who call themselves 'positivists' but whose approach Jörg Kammerhofer has more aptly [labelled](#) 'orthodox'. Two aspects of Azaria's account characterise it as orthodox: First, she takes the general assumptions she attributes to the majority of relevant practitioners as the unquestioned starting point of her analysis. Second, she claims not to need a philosophical, social, political or other kind of theoretical substratum for her doctrinal claims. However, doctrinal positions necessarily have an underlying theory. Rejecting to engage with the theoretical underpinnings of a doctrinal argument therefore leads to unconsciously adopting a theoretical position. Because it is not deliberately adopted based on theoretical reflection, this theoretical position will often turn out to be inconsistent.

Legitimacy through predictability: Convincing states to use international law?

Even when engaging in doctrinal work, international legal scholars cannot avoid taking a stance on theoretical questions. In this vein, Jan Klabbbers [criticised](#) Azaria's and two other articles in the same [issue](#) of the European Journal of International Law for seeming "to operate in a political vacuum, presupposing that the making of international law can be reduced to a technical exercise, informed at best by analytical-philosophical considerations but without any concern for political concepts such as legitimation, democracy, representation or accountability" ([Klabbbers](#) at p. 270). Azaria does indeed try to place her analysis in a political and theoretical vacuum. It is important to note, however, that she does engage with questions of legitimacy. After all, her argument is not merely that the ILC engages in 'codification by interpretation', but that this development should be welcomed, because it provides legitimacy to international law as a whole.

Azaria mentions the developments in international law in the 1990s and 2000s that gave rise to the 'fragmentation debate', i.e. the increased number of multilateral

conventions and adjudicative bodies (at p. 198). She argues that the danger of decreased clarity and predictability of international law and an ensuing weakened confidence in international law “is pressing today given that some states seem keen to disengage from multilateral treaties (and international adjudication)” (at p. 199). In Azaria’s account, the ILC can remedy this through its practice of ‘codification by interpretation’. She argues that by reaffirming and clarifying the secondary rules contained in the VCLT, the ILC can increase the predictability of international law as a whole and thereby convince states to continue to use international law to regulate their conduct (at p. 199).

It is common among international legal scholars to claim that increased clarity and predictability of rules creates a ‘normative pull’, i.e. that increased predictability convinces states to comply with international legal rules. The claim is essentially an empirical claim for which only limited empirical evidence exists. The thesis may have been plausible to some degree in the 1990s – when Thomas Franck [articulated](#) its most detailed theoretical variant and when Abram Chayes and Antonia Handler Chayes [found](#) in their managerial account of compliance that unintentional (!) violations of treaty obligations are often partly caused by ambiguous and indeterminate treaty language. However, it is hard to imagine that the Donald Trumps, Jair Bolsonaro, and Rodrigo Duterte of our current world would be more inclined to adhere to international treaties just because the ILC has clarified the VCLT rules for them.

International law doctrine and critical international law

In passing, Azaria (at p. 172) mentions David Kennedy’s [observation](#) that interpretation operates as the functional equivalent of truth. She quotes Jan Klabbers who concludes from the same Kennedy piece that “whoever controls the process of interpretation, therewith controls the truth” ([Klabbers](#) at p. 20). Kennedy’s observation was part of a critique of power and ideology in how legal meaning is created. Klabbers took this as a starting point for his argument that international lawyers should focus on virtue ethics in their accounts of interpretation, given that the interpreting agents are ultimately personally responsible for their interpretative decisions. In the context of Azaria’s argument, Kennedy’s and Klabbers’ statements acquire a new meaning. Here, the observation that whoever controls the interpretation process therewith controls the truth sounds like a rallying cry directed at fellow international lawyers committed to the project of [liberal internationalism](#).

Doubling down on both formalism and managerialism will not stop the rise of far-right and openly fascist movements. Martti Koskeniemi’s [thesis](#) that the ‘backlash’ against liberal internationalism is mainly fuelled by opposition to liberal claims of expertise may not convey the whole story. Anne Orford [suggests](#) focusing on the economic aspects of liberal internationalism instead. Similarly, Ntina Tzouvala argues in her recent [monograph](#) that “any effort to counter the rise of the far-right without questioning authoritarian neoliberal capitalism will always yield precarious gains” (at p. 19). Rose Parfitt [invites](#) us to look more closely at the history of international law and fascism to understand how fascism, paradoxically, has become a truly global phenomenon, to understand what makes the boomerang of

colonialism, which returned to Europe in the form of fascism, yet again boomerang to the Global South. In any case, things do not exactly seem to be going in the right direction and 'keep calm and carry on' may not be the best response.

By way of conclusion

The point of this contribution is not to convince 'orthodox generalist' international lawyers to abandon doctrine altogether and engage in critical legal scholarship instead (although I would be curious to see what kind of world this would bring about and suspect that it would be a slightly better one). The more moderate suggestion is that all international legal scholars should take note of critical legal scholarship, that they should reflect on the place of their scholarship with regard to the most pressing concerns of our present world, and that they should do so in a theoretically informed manner. Just like critical international law scholars cannot avoid engaging with doctrine, doctrinal scholarship cannot avoid engaging with critique. As Marina Veli#kovi# succinctly put it in a [tweet](#) last week:

"Some people treat critical scholarship (also feminist critiques, TWAIL, marxism) as a topping that adds flavor, but which can be removed without the meal losing any nutrition whereas actually these critiques are saying if we keep eating the same thing we'll all get scurvy".

